

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jun 14, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JANINE G.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No.1:17-CV-03110-JTR

ORDER GRANTING IN PART  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF Nos. 12, 13. Attorney D. James Tree represents Janine G. (Plaintiff); Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 5. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

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## **STATEMENT OF FACTS**

The facts of the case are set forth in the administrative hearing transcript, the ALJ's decision, and the briefs of the parties. They are only briefly summarized here.

Plaintiff was 51 years old at the alleged date of onset. Tr. 169. She has a bachelor's of science degree in nursing. Tr. 41. She reported her past work was as a registered nurse. Tr. 209. Plaintiff reported that she stopped working on November 14, 2011 stating that she was let go following a conflict with management and that she could not deal with the stress. Tr. 187, 238.

able for determining credibility  
 involving ambiguities. *Andrews*  
 Court reviews the ALJ's deter  
 interpretation of the statutes. *M*

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo, deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d

1 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
2 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
3 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
4 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
5 another way, substantial evidence is such relevant evidence as a reasonable mind  
6 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
7 U.S. 389, 401 (1971).

8 If the evidence is susceptible to more than one rational interpretation, the  
9 court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at  
10 1097. If substantial evidence supports the administrative findings, or if conflicting  
11 evidence supports a finding of either disability or non-disability, the ALJ's  
12 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-30 (9th Cir.  
13 1987). Nevertheless, a decision supported by substantial evidence will be set aside  
14 if the proper legal standards were not applied in weighing the evidence and making  
15 the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,  
16 433 (9th Cir. 1988).

### 17 **SEQUENTIAL EVALUATION PROCESS**

18 The Commissioner has established a five-step sequential evaluation process  
19 for determining whether a person is disabled. 20 C.F.R. § 404.1520(a); *see Bowen*  
20 *v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of  
21 proof rests upon the claimant to establish a prima facie case of entitlement to  
22 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the  
23 claimant establishes that physical or mental impairments prevent her from  
24 engaging in her previous occupations. 20 C.F.R. § 404.1520(a)(4). If the claimant  
25 cannot do her past relevant work, the ALJ proceeds to step five, and the burden  
26 shifts to the Commissioner to show that (1) the claimant can make an adjustment to  
27 other work, and (2) specific jobs which the claimant can perform exist in the  
28 national economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94

1 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the  
2 national economy, a finding of “disabled” is made. 20 C.F.R. § 404.1520(a)(4)(v).

### 3 **ADMINISTRATIVE DECISION**

4 On January 19, 2016, the ALJ issued a decision finding Plaintiff was not  
5 disabled as defined in the Social Security Act.

6 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
7 activity since December 1, 2012, the alleged date of onset. Tr. 17.

8 At step two, the ALJ determined Plaintiff had the following severe  
9 impairments: obesity; edema; adrenal insufficiency; idiopathic  
10 hyperparathyroidism; steatosis of the liver; fibromyalgia versus fibromyositis  
11 versus unspecified myalgia; plantar fasciitis; and knee osteoarthritis. Tr. 17.

12 At step three, the ALJ found Plaintiff did not have an impairment or  
13 combination of impairments that met or medically equaled the severity of one of  
14 the listed impairments. Tr. 20.

15 At step four, the ALJ assessed Plaintiff’s residual function capacity and  
16 determined she could perform a range of light work with the following limitations:

17 she can stand and/or walk for about four hours in an eight-hour  
18 workday. She can frequently handle, finger, and feel. Her work should  
19 not require the operation of foot controls. She cannot crawl or climb.  
20 She can occasionally balance, stoop, knee, and crouch. She should  
21 avoid concentrated exposure to vibration, extreme temperatures, and  
hazards.

22 Tr. 21. The ALJ identified Plaintiff’s past relevant work as a general nurse and a  
23 healthcare administrator and concluded that Plaintiff was able to perform her past  
24 relevant work as a healthcare administrator. Tr. 24.

25 As an alternative to a step four denial, the ALJ found at step five that,  
26 considering Plaintiff’s age, education, work experience and residual functional  
27 capacity, and based on the testimony of the vocational expert, there were other jobs  
28 that exist in significant numbers in the national economy Plaintiff could perform,

1 including the jobs of consulting nurse and hospital admitting clerk. Tr. 25-26. The  
2 ALJ concluded Plaintiff was not under a disability within the meaning of the Social  
3 Security Act at any time from December 1, 2012, through the date of the ALJ's  
4 decision. Tr. 26.

## 5 **ISSUES**

6 The question presented is whether substantial evidence supports the ALJ's  
7 decision denying benefits and, if so, whether that decision is based on proper legal  
8 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the  
9 medical source opinions, (2) failing to properly address all of Plaintiff's severe  
10 impairments at step two, and (3) failing to properly address Plaintiff's symptom  
11 statements.

## 12 **DISCUSSION**

### 13 **1. Medical Opinions**

14 Plaintiff challenges the ALJ's treatment of the opinion from a nonexamining  
15 reviewing physician, Gordon Hale, M.D., and the opinion from an examining  
16 physician, William Drenguis, M.D., and the Appeals Council's treatment of the  
17 opinion from Plaintiff's treating physician, Julia Robertson, M.D. ECF No. 12 at  
18 18-20.

19 In weighing medical source opinions, the ALJ should distinguish between  
20 three different types of physicians: (1) treating physicians, who actually treat the  
21 claimant; (2) examining physicians, who examine but do not treat the claimant;  
22 and, (3) nonexamining physicians who neither treat nor examine the claimant.  
23 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more  
24 weight to the opinion of a treating physician than to the opinion of an examining  
25 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ  
26 should give more weight to the opinion of an examining physician than to the  
27 opinion of a nonexamining physician. *Id.*

1 When a treating physician's opinion is not contradicted by another  
2 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.  
3 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating  
4 physician's opinion is contradicted by another physician, the ALJ is only required  
5 to provide "specific and legitimate reasons" for rejecting the opinion. *Murray v.*  
6 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when an examining  
7 physician's opinion is not contradicted by another physician, the ALJ may reject  
8 the opinion only for "clear and convincing" reasons, and when an examining  
9 physician's opinion is contradicted by another physician, the ALJ is only required  
10 to provide "specific and legitimate reasons" to reject the opinion. *Lester*, 81 F.3d  
11 at 830-31.

12 The specific and legitimate standard can be met by the ALJ setting out a  
13 detailed and thorough summary of the facts and conflicting clinical evidence,  
14 stating his interpretation thereof, and making findings. *Magallanes v. Bowen*, 881  
15 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer his  
16 conclusions, he "must set forth his interpretations and explain why they, rather  
17 than the doctors', are correct." *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir.  
18 1988).

#### 19 **A. The Opinions**

20 On October 27, 2013, Dr. Hale reviewed the medical evidence available at  
21 that time, including the opinion of Dr. Dreguis, to which he assigned great weight.  
22 Tr. 105. Dr. Hale opined that Plaintiff could occasionally lift and/or carry twenty  
23 pounds, frequently lift and/or carry ten pounds, stand and/or walk for four hours,  
24 and sit for about six hours. Tr. 105. He limited Plaintiff's ability to push and pull  
25 in the upper extremities to frequent and in the lower left extremity to frequent. *Id.*  
26 All posturals were limited to occasional except balancing, which was limited to  
27 frequent. Tr. 105-06. Plaintiff's handling, fingering, and feeling were limited to  
28 frequent bilaterally. Tr. 106. He opined that Plaintiff should avoid concentrated

1 exposure to extreme cold, vibrations, and hazards such as machinery and heights.  
2 Tr. 106-07. Then in the “Additional Explanation” section, Dr. Hale stated that  
3 “[i]n view of the claimant’s combined impairments related primarily to  
4 fibromyalgia, she is capable of no more than sedentary work activity.” Tr. 107.

5 Dr. Drenguis examined Plaintiff on July 27, 2013 and reviewed three clinic  
6 notes dated August 29, 2012, April 4, 2012, and March 13, 2012. Tr. 328-32. All  
7 of these clinic records predate Plaintiff’s alleged date on onset. He limited  
8 Plaintiff’s standing/walking to three hours and sitting to five hours. Tr. 331. He  
9 limited her lifting/carrying to twenty pounds occasionally and ten pounds  
10 frequently. Tr. 332. He limited climbing, stooping, kneeling, crouching, and  
11 crawling to occasionally. *Id.* He limited reaching, handling, fingering, and feeling  
12 to frequent. *Id.* He did not provide any environmental limitations. *Id.*

13 On February 24, 2016, Plaintiff’s treating provider, Dr. Robertson,  
14 completed a medical report form stating that Plaintiff had been diagnosed with  
15 fibromyalgia syndrome, adrenal hypofunction, menopausal symptoms, fatigue,  
16 idiopathic peripheral neuropathy, anxiety, obesity, Crohn’s disease, osteoarthritis,  
17 insomnia, and chronic pain. Tr. 470. She stated that working on a regular and  
18 continuous basis would cause Plaintiff’s condition to deteriorate. Tr. 471.  
19 Additionally, when asked if she thought Plaintiff would miss work due to her  
20 impairments, she stated “[Patient] is not able to work due to condition.” *Id.* She  
21 stated that these limitations had existed since August of 2012. *Id.*

## 22 **B. The ALJ’s Decision**

23 The ALJ gave significant weight to Dr. Hale’s opinion, but he represented  
24 the opinion as a limitation to light work with additional limitations in Plaintiff’s  
25 ability to stand and/or work. Tr. 23-24. The ALJ never addressed Dr. Hale’s final  
26 statement limiting Plaintiff to sedentary work.

27 The ALJ then used Dr. Hale’s opinion as justification for giving only some  
28 weight to the opinion of Dr. Drenguis, finding that the record supported a residual

1 functional capacity with fewer limitations, therefore, “I give greater weight to  
2 another medical assessment, from a physician who reviewed a greater range of the  
3 claimant’s medical records.” Tr. 23. Since Dr. Hale’s opinion is the only other  
4 physical residual functional capacity opinion addressed in the ALJ’s decision, the  
5 ALJ’s reference to “another medical assessment” must be to that of Dr. Hale.

6 The ALJ did not review Dr. Robertson’s opinion as it was submitted after  
7 the ALJ’s decision. However, it was addressed by the Appeals Council and  
8 associated with the record. Tr. 2, 4. Therefore, this Court is to consider the  
9 opinion when determining whether the ALJ’s determination is supported by  
10 substantial evidence. *Brewes v. Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157, 1162-  
11 63 (9th Cir. 2012) (“[W]hen the Appeals Council considers new evidence in  
12 deciding whether to review a decision of the ALJ, that evidence becomes part of  
13 the administrative record, which the district court must consider when reviewing  
14 the Commissioner’s final decision for substantial evidence.”).

### 15 **C. Discussion**

16 The ALJ erred in the treatment of Dr. Hale’s and Dr. Drenguis’ opinions in  
17 two ways. First, the ALJ failed to address Dr. Hale’s limitation to sedentary work.  
18 *See* S.S.R. 96-8p (“The RFC [residual functional capacity] assessment must always  
19 consider and address medical source opinions. If the RFC assessment conflicts  
20 with an opinion from a medical source, the adjudicator must explain why the  
21 opinion was not adopted.”). The failure to address the limitation to sedentary  
22 work, assigning the opinion significant weight, and adopting an amended light  
23 residual functional capacity determination is synonymous to rejection of the  
24 limitation to sedentary work without providing a reason. Thus, the ALJ erred.

25 Second, the ALJ rejected the opinion of Dr. Drenguis partially based on the  
26 presumption that Dr. Hale’s opinion was less limiting. *See* Tr. 23 (finding that  
27 Plaintiff’s activities, examination findings, and treatment records showed Plaintiff  
28 was more capable than Dr. Drenguis opined and, as a result, he gave significant



weight to Dr. Hale’s opinion). However, Dr. Hale’s limitation to sedentary work means his opinion is more limiting than Dr. Drenguis’. Therefore, the ALJ’s rationale for the weight assigned to the two opinions in the record becomes nonsensical.

In addition, when determining if the ALJ’s residual functional capacity is supported by substantial evidence, this Court is to consider the opinion of Plaintiff’s treating provider, Dr. Robertson, who opined Plaintiff was unable to work. Tr. 471. As such, the record currently holds three medical source opinions: First, the opinion of the nonexamining reviewer, Dr. Hale, that Plaintiff is limited to sedentary work. Second, the opinion of examining provider, Dr. Dreguis, who opined limitations somewhere between sedentary work<sup>1</sup> and light work<sup>2</sup>. Tr. 331-32. Third, the opinion of Plaintiff’s treating provider, Dr. Robertson, that Plaintiff was not capable of work. Tr. 471. All three of the medical source opinions are more limiting than the ALJ’s residual functional capacity determination finding Plaintiff could stand/walk for a total of four hours. Tr. 21. Therefore, the ALJ’s residual functional capacity determination is not supported by substantial evidence and the case is remanded for the ALJ to reweigh the medical source opinions in the file and formulate a new residual functional capacity determination supported by substantial evidence.

## **2. Step Two**

Plaintiff asserts that the ALJ erred by failing to recognize Plaintiff’s attention deficit hyperactivity disorder (ADHD), cognitive disorder, anxiety, and depression as severe at step two. ECF No. 12 at 6-10.

The step-two analysis is “a de minimis screening device used to dispose of groundless claims.” *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). A

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<sup>1</sup>Sedentary work is defined at 20 C.F.R. 404.1567(a).

<sup>2</sup>Light work is defined at 20 C.F.R. 404.1567(b).

1 medically determinable impairment “must be established by objective medical  
2 evidence from an acceptable medical source.” 20 C.F.R. § 404.1521. Once the  
3 ALJ has established that a claimant has a medically determinable mental  
4 impairment, he “must specify the symptoms, signs, and laboratory findings that  
5 substantiate the presence of the impairment(s)” and document his findings as to the  
6 four broad functional areas set out in the 12.00C criteria. 20 C.F.R. 404.1520a(b),  
7 (e). An impairment is “not severe” if it does not “significantly limit” the ability to  
8 conduct “basic work activities.” 20 C.F.R. § 404.1522(a). Basic work activities are  
9 “abilities and aptitudes necessary to do most jobs.” 20 C.F.R. § 404.1522(b). “An  
10 impairment or combination of impairments can be found not severe only if the  
11 evidence establishes a slight abnormality that has no more than a minimal effect on  
12 an individual’s ability to work.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.  
13 1996) (internal quotation marks omitted).

14 The ALJ stated that Plaintiff “conceded that she had not been diagnosed  
15 with a cognitive disorder or with any attention deficit disorder.” Tr. 18. This is  
16 the end of the ALJ’s discussion of either ADHD or a cognitive disorder. Tr. 18-19.  
17 The ALJ then concluded that Plaintiff’s “medically determinable mental  
18 impairments do not cause more than minimal limitation in the claimant’s ability to  
19 perform basic mental work activities.” Tr. 19.

20 Plaintiff’s testimony that she was not sure whether she had been diagnosed  
21 with ADHD is not sufficient to support a finding that there was no medically  
22 determinable impairment. Tr. 66-68. ADHD is a medically determinable  
23 impairment. Plaintiff’s treating physician, Dr. Robertson, administered testing  
24 demonstrating that Plaintiff was markedly positive for inattention and positive for  
25 hyperactivity and diagnosed Plaintiff with ADHD. Tr. 358; 20 C.F.R. § 404.1521  
26 (A medical determinable impairment “must be established by objective medical  
27 evidence from an acceptable medical source.”). However, it is unclear if the ALJ  
28 considered ADHD and its resulting symptoms in his evaluation of the 12.00C

1 criteria as the ALJ only addressed, depression, anxiety, memory and a general  
2 reference to “psychological impairments.” Tr. 18-19.

3 Likewise, the ALJ’s reliance on Plaintiff’s statement that she has not been  
4 diagnosed with a cognitive disorder is insufficient to support a finding of no  
5 psychological limitations. Plaintiff had been diagnosed with fibromyalgia, which  
6 the ALJ deemed to be a severe impairment at step two. Tr.17. The Commissioner  
7 has promulgated a regulation which recognizes cognitive or memory problems,  
8 commonly known as a “fibro fog,” as a symptom of fibromyalgia. *See* S.S.R. 12-  
9 2p. The ALJ failed to address the psychological symptoms associated with  
10 Plaintiff’s diagnosis of fibromyalgia in the opinion.

11 Neither Plaintiff’s diagnosis of ADHD nor the potential of cognitive of  
12 memory problems from fibromyalgia were considered by the ALJ. Since this case  
13 is being remanded for the ALJ to properly address the medical source opinions in  
14 the file, the ALJ will readdress Plaintiff’s psychological impairments at step two  
15 and take testimony from a medical expert and a psychological expert regarding any  
16 potential for functional limitations resulting from Plaintiff’s medically  
17 determinable impairments.

### 18 **3. Plaintiff’s Symptom Statements**

19 Plaintiff contests the ALJ’s determination that Plaintiff’s symptoms  
20 statements were not entirely credible. ECF No. 12 at 10-18.

21 Since the case is being remanded for the ALJ to properly address the  
22 medical source opinions in the file, the ALJ is further instructed to make a new  
23 determination as to the supportability of Plaintiff’s symptom statements in  
24 accordance with S.S.R. 16-3p.

### 25 **REMEDY**

26 The decision whether to remand for further proceedings or reverse and  
27 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,  
28 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate

1 where “no useful purpose would be served by further administrative proceedings,  
2 or where the record has been thoroughly developed,” *Varney v. Secretary of Health*  
3 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused  
4 by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280  
5 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)  
6 (noting that a district court may abuse its discretion not to remand for benefits  
7 when all of these conditions are met). This policy is based on the “need to  
8 expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are  
9 outstanding issues that must be resolved before a determination can be made, and it  
10 is not clear from the record that the ALJ would be required to find a claimant  
11 disabled if all the evidence were properly evaluated, remand is appropriate. *See*  
12 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211  
13 F.3d 1172, 1179-80 (9th Cir. 2000).

14 In this case, it is not clear from the record that the ALJ would be required to  
15 find Plaintiff disabled if all the evidence were properly evaluated. Further  
16 proceedings are necessary for the ALJ to weigh the medical source opinions in the  
17 file, make a new step two determination, and address Plaintiff’s symptom  
18 statements in accord with S.S.R. 16-3p. The ALJ will also supplement the record  
19 with any outstanding evidence, send Plaintiff for a psychological consultative  
20 examination, and take testimony from a vocational, a medical, and a psychological  
21 expert at any remand proceedings.

## 22 CONCLUSION

23 Accordingly, **IT IS ORDERED:**

24 1. Defendant’s Motion for Summary Judgment, **ECF No. 13**, is  
25 **DENIED**.

26 2. Plaintiff’s Motion for Summary Judgment, **ECF No. 12**, is  
27 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for  
28 additional proceedings consistent with this Order.

1           3.     Application for attorney fees may be filed by separate motion.

2           The District Court Executive is directed to file this Order and provide a copy  
3 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**  
4 and the file shall be **CLOSED**.

5           **IT IS SO ORDERED.**

6           DATED June 14, 2018.



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A handwritten signature in black ink, appearing to be "M" or "Rodgers", written over a horizontal line.

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE